UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

HENDRICKSON TRUCKING COMPANY, *Petitioner/Cross-Respondent,* v. NATIONAL LABOR RELATIONS BOARD, *Respondent/Cross-Petitioner*. INTERNATIONAL BROTHERHOOD OF TEAMSTERS (IBT), Local 1038, *Intervenor*.	Case No. 17-1226

John R. Canzano (P30417)
McKnight, Canzano, Smith Radtke, & Brault, P.C.
423 N. Main Street, Ste. 200
Royal Oak, Michigan 48067
Tel: (248) 354-9650
Fax: (248) 354-9656

Email: jcanzano@michworkerlaw.com
Counsel for Teamsters Local 1038

Timothy J. Ryan (P40990)
Jackson Lewis P.C.
61 Commerce Avenue SW
Grand Rapids, Michigan 49503
Tel: (616) 940-0230
Fax: (616) 285-7215
Email:
Timothy.Ryan@jacksonlewis.com

Counsel for Hendrickson Trucking Company

Elizabeth Heaney
Jeffrey W. Burritt
National Labor Relations Board
1015 Half Street, SE
Washington, D.C. 20570
(202) 273-1743
(202) 273-2989
Counsel For National Labor Relations Board

PETITIONER'S MOTION TO STAY THE MANDATE PENDING FILING OF A PETITION FOR WRIT OF CERTIORARI

I. Introduction

Petitioner Hendrickson Trucking Company ("Company" or "Petitioner") moves this Court for an Order staying the mandate for 90 days pending its filing of a petition for a writ of certiorari with the United States Supreme Court, under Federal Rule of Appellate Procedure 41(d)(1), Local Rule 41(2), and 28 U.S.C. § 2101(f). The Court should grant the motion because the certiorari petition will present a substantial question and there is good cause for a stay. FRAP 41(d)(1); LR 41(2). Specifically, the Court's Opinion relied on an alleged unfair labor practice that was not part of the unfair labor practice complaint in violation of due process protections. April 12, 2019 Opinion ("Opinion") at 5. In addition, the Opinion failed to apply the "independent evaluation of the merits" test required under *Wilkes-Barre Hosp. Co. LLC v. NLRB* 857 F. 3d 364 (D.C. Cir. 2017). Opinion at 6-7.

Because determining the make whole remedies now would risk wasting resources of the parties if the Supreme Court ultimately holds the remedy improper, there is good cause for staying the mandate. Moreover, Respondent and Intervenor will not be prejudiced by a 90-day stay, because Respondent has already requested an extension (*See* Document #1718857 – Respondent requesting a 60-day extension to file its Brief), and the underlying events took place approximately seven years ago.

II. Factual and procedural background

The unfair labor practice hearing took place on May 21 and 22, 2013. The hearing was based on an amended unfair labor practice complaint, which included the following basic allegations:

1. The Company prematurely declared impasse and implemented its contract proposal;

2. The Company failed and refused to meet with the Union;

3. The Company failed to provide certain requested information about an alter-ego company; and

4. The Company failed to reinstate strikers after they made an offer to return to work.

The hearing was conducted by Administrative Law Judge Donna Dawson ("ALJ Dawson"). ALJ Dawson issued her first decision nearly one year after the hearing closed, on May 16, 2014. In, that decision ALJ Dawson found against the Company on every allegation in the amended complaint, and improperly found that the Company committed violations not alleged in the amended complaint.

The Company filed timely exceptions to the Board. Among the exceptions the Company raised was that ALJ Dawson lacked any authority to conduct the hearing or issue a decision because the Board approved her appointment at a time when it lacked a valid quorum and was thus without authority to act under the Supreme Court's decision in *NLRB v Noel Canning*, 134 S.Ct. 2550 (2014) and

that ALJ Dawson found violations outside the allegations of the amended complaint.

On April 6, 2016, the Board issued its Decision and Order remanding this matter. In its Order, the Board remanded the case to the ALJ to issue a new recommended decision and order based on Petitioner's argument that the Board lacked a valid quorum when it originally approved ALJ Dawson's appointment in April 2013. Not surprisingly, less than a week after the remand, by her Order Ratifying and Adopting Decision dated April 12, 2016, ALJ Dawson "rubber stamped" her first decision.

The Company filed timely exceptions to the ALJs ratification of her decision. On October 11, 2017, the Board issued its decision on those exceptions. While making some modification to ALJ Dawson's decision, the Board left intact her conclusions that the parties were not at impasse, that the strikers were unfair labor practice strikers entitled to reinstatement when they made their offer to return to work, and that the Company failed to provide certain information and refused the Union's request to meet and bargain.

On October 25, 2017, the Company timely filed its petition for review. On April 12, 2019, this Court issued its Judgment.

III. Argument

A. The legal standard

"A party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court." FRAP 41(d)(1). The motion "must show that the certiorari petition would present a substantial question and that there is good cause for a stay." *Id.* "No exceptional circumstances need be shown to justify a stay." *Bryant v. Ford Motor Co.*, 886 F.2d 1526, 1528 (9th Cir. 1989). "This matter is entrusted to the circuit court's sound discretion." *Id.*

B. The certiorari petition would present a substantial question because the ALJ's decision was premised on unsettled law

The certiorari petition would present a substantial question because there is clear, yet unequally applied, law regarding the "independent evaluation of the merits" test. *See, Wilkes-Barre Hosp. Co. LLC v. NLRB* 857 F. 3d 364 (D.C. Cir. 2017). In addition, the ALJ's decision was derived, in part, on alleged unfair practices not contained within the Amended Complaint. In deciding whether to grant a petition for a writ of certiorari, the Supreme Court mainly considers whether "United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court." Supreme Court Rule 10(c).

This Court did not apply the "independent evaluation of the merits" test. Here, in its decision in *National Labor Relations Board v. Noel Canning*, 134 S.Ct. 2550 (2014), the United States Supreme Court held that the three recess appointments President Obama made to the National Labor Relations Board on

January 4, 2012 were invalid. As stated in *Indianapolis Glove Company*, 88 NLRB 986, 987 (1950), "[I]t is essential not only to avoid actual partiality and prejudgment... in the conduct of Board proceedings, but also to avoid even the appearance of a partisan tribunal. *See also, The New York Times Company*, 265 NLRB No. 45 (1982); *Filmation Associates, Inc*., 227 NLRB 1721 (1977); *The Center for United Labor Action*, 209 NLRB 814 (1974). As a result, this Court issued its decision in *Wilkes-Barre Hosp. Co. LLC*, requiring that an improperly appointed Regional Director conduct an "independent evaluation of the merits" on his decision to issue a complaint. That does not address the question of whether an improperly appointed ALJ, charged with making a judicial determination on the merits of a complaint can cure the improper appointment by simply reissuing the decision she made at the time she was acting pursuant to the improper appointment.

ALJ Dawson looked outside the amended complaint in violation of due process protections. It is undisputed that the Board cannot find and remedy a violation of the Act not specified in the complaint and any such finding violates the due process protections. *See*, *Bellagio, LLC v. NLRB*, 854 F.3d 703 (D.C. Cir. 2017)(holding that it would be a due process violation for the Board to "find and remedy a violation of the Act not specified in the Complaint unless the issues is closely connect to the subject matter of the complaint and has been fully

litigated."); *NYP Holdings, Inc.*, 353 NLRB 343, 344 (2008); *NLRB v. Quality C.A.T.V., Inc.*, 824 F.2d 542 (7th Cir. 1987). This case presents an opportunity for the Supreme Court to address whether there are limits on the NLRB's ability to prosecute uncharged claims.

C. There is good cause for a stay

Absent a stay, the mandate will issue, returning the case to the NLRB. Unless the NLRB itself issues a stay, the parties would be required to litigate the remedies to an action that the Supreme Court may hold was decided by an ALJ without authority and in violation of due process protections. This would waste the resources of the parties.

Moreover, Respondent and Intervenor would not be harmed by the requested stay. The Respondent has already requested and been granted an extension. (*See*, Document #1718857) Furthermore, the underlying events occurred seven years ago. A 90-day stay of the mandate would not cause hardship.

Accordingly, there is good cause for a stay.

D. The petition for certiorari would not be frivolous or filed merely for delay

For the above reasons, the certiorari petition would not be frivolous, but instead would raise a substantial question. Nor would the certiorari petition be filed merely for delay. To the contrary, a stay has the salutary effect of

preserving resources lest the parties litigate a case that the Supreme Court ultimately holds is unfounded.

IV. Conclusion

For the above reasons, the Court should stay issuance of the mandate for 90 days pending Petitioner's filing of a petition for a writ of certiorari with the United States Supreme Court.

Respectfully submitted,

JACKSON LEWIS P.C.

By: /s/ *Timothy J. Ryan*
Timothy J. Ryan (P40990)
Jackson Lewis P.C.
61 Commerce Avenue SW
Grand Rapids, Michigan 49503
Email:
Timothy.Ryan@jacksonlewis.com

Dated: April 29, 2019

Counsel for Hendrickson Trucking Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 29, 2019, the forgoing Motion to Stay The Mandate Pending Filing of Petition For Writ of Certiorari was submitted for filing with the Clerk of Court via ECF, with service electronically through the Court's ECF system on all registered counsel of record.

/s/Timothy J. Ryan

CERTIFICATE OF COMPLIANCE

I certify that this Petitioner's Motion to Stay The Mandate Pending Filing of Petition For Writ of Certiorari conforms to the requirements of FRAP 32(g)(1). The length of this Motion, and including this certificate of compliance and the certificate of service is1671 words.

/s/Timothy J. Ryan

4837-4502-8501, v. 2